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9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JOHN RICHARD BRINSON JR.,

16 Defendant.

No. 17-MJ-1487-DUTY

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION FOR HEARING IN
REGARD TO DEFENDANT'S DETENTION
PURSUANT TO CRIMINAL COMPLAINT

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18 Plaintiff United States of America, by and through its counsel
19 of record, the Acting United States Attorney for the Central District
20 of California and Assistant United States Attorney Vanessa Baehr-
21 Jones, hereby files its Opposition to Defendant's Motion for Hearing
22 in Regard to Defendant's Detention Pursuant to Criminal Complaint.

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1 This opposition is based upon the attached memorandum of points
2 and authorities, the files and records in this case, and such further
3 evidence and argument as the Court may permit.

4 Dated: July 27, 2017

Respectfully submitted,

5 SANDRA R. BROWN
6 Acting United States Attorney

7 LAWRENCE S. MIDDLETON
8 Assistant United States Attorney
9 Chief, Criminal Division

10 /s/
11 VANESSA BAEHR-JONES
12 Assistant United States Attorney

13 Attorneys for Plaintiff
14 UNITED STATES OF AMERICA
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On June 14, 2017, defendant John Richard Brinson Jr. ("defendant") made his initial appearance in the Eastern District of California on a criminal complaint out of the Central District of California, charging him with production of child pornography, in violation of 18 U.S.C. § 2251(a). During the hearing, defense counsel waived defendant's right to an identify hearing, waived any formal reading of the complaint, and waived "further advisement of [defendant's] constitutional and statutory rights." (See Decl. of Vanessa Baehr-Jones ("Baehr-Jones Delc."), ¶ 2(e).) Notwithstanding defendant's waivers, defendant now moves for immediate discharge from custody, arguing that there was a violation of Rule 5.1 since "no waiver of prelim was filed in EDCal." (Mot. at 4.) The record belies this argument, however, given defense counsel's explicit waivers and the lack of any challenge to the transfer of defendant to the charging district. Moreover, unlike the Central District of California, the Eastern District does not take written waivers of defendant's out-of-district rights before transfer and instead conducts these waivers orally. (Baehr-Jones Decl. ¶¶ 3-4.) Thus, the lack of a filed waiver form is immaterial. Defense counsel's broad waiver included any right defendant might have had under Rule 5.1 to have a preliminary hearing held in the Eastern District within 14 days of his initial appearance. Upon appearing in this district, the Court set a preliminary hearing date of August 4, 2017, a date within 14 days of his initial appearance here. Thus, defendant has not articulated any violation of Rule 5.1 warranting his immediate release.

1 **II. STATEMENT OF FACTS**

2 On June 14, 2017, defendant made his initial appearance in the
3 Eastern District of California before the Honorable Stanley A. Boone,
4 United States Magistrate Judge, on a criminal complaint originating
5 from the Central District of California, charging defendant with
6 production of child pornography, in violation of 18 U.S.C. § 2251(a).
7 (Exh. 1 to Mot; see also 17-MJ-1478-DUTY.)

8 During defendant's initial appearance, the Court advised
9 defendant of the nature of the charges against him, including the
10 maximum penalties. (Baehr-Jones Decl. ¶ 2(a).) The Court further
11 advised defendant of his right to remain silent and his right to
12 consular notification. (Id. ¶ 2(b).) Defendant was advised of his
13 right to have court-appointed counsel and Assistant Federal Public
14 Defender ("AFPD") Reed Grantham was appointed for that purpose. (Id.
15 ¶ 2(c).) The Court then instruction the defendant, "Finally, you
16 have the right to have an identity hearing where the Central District
17 of California would have to prove in fact that you are the individual
18 that they are seeking. Mr. Grantham." (Id. ¶ 2(d).)

19 Defense counsel replied, "Thank you, Your Honor. Assistant
20 Federal Defender Reed Grantham on behalf of Mr. Brinson who is
21 present and in custody. At this time, we would waive, we would waive
22 that identity hearing. We would waive any formal reading of the
23 complaint, or further advisement of his constitutional or statutory
24 rights, and deny the allegation in the complaint." (Id. ¶ 2(e).)
25 The Court then entered a denial of the charge in the complaint and
26 the parties discussed the issue of detention. (Id. ¶ 2(f).) The
27 court set a further hearing on the matter of detention for June 16,
28 2017. (Id.)

1 On June 16, 2017, defendant appeared for a detention hearing
2 before Judge Boone. According to the minutes of this proceeding,
3 defendant submitted and the court ordered defendant detained and
4 transported to the Central District of California. (Exh. 1 to Mot.,
5 at 2.) On June 19, 2017, the court issued a signed detention order
6 and commitment to another district. (Id.)

7 On July 21, 2017, defendant made his initial appearance in the
8 Central District of California before the Honorable John E.
9 McDermott, United States Magistrate Judge. Gregory Nicolaysen was
10 appointed as counsel for defendant, and a preliminary hearing date
11 was set for August 4, 2017. Defendant was also advised of his
12 constitutional and statutory rights and was ordered remanded. During
13 the hearing, defense counsel raised the issue of whether there had
14 been a Rule 5.1 violation and whether defendant had waived his right
15 to a preliminary hearing during his appearances in the Eastern
16 District of California. (Mot. at 4.)

17 On July 25, 2017, defendant filed the instant motion arguing
18 that defendant had not waived his right to a preliminary hearing in
19 the Eastern District and did not agree to extend the deadline of Rule
20 5.1 since "no waiver of prelim was filed in EDCA." (Mot. at 4.)

21 On July 25, 2017, the government learned that the Eastern
22 District of California does not have a standard written waiver form
23 for out-of-district arrests and transfers. (Baehr-Jones Decl. ¶ 3-
24 4.) The government further learned that the practice in the Eastern
25 District is for the court to accept such waivers orally. (Id. ¶ 4.)

26 **III. ARGUMENT**

27 Rule 5.1 provides that a preliminary hearing must be conducted
28 within 14 days after the initial appearance if the defendant is in

1 custody unless, among other exceptions, "the defendant waives the
2 hearing." Fed. R. Crim. P. 5.1(a)(1), (c). The rule further allows
3 the defendant to elect whether to hold the preliminary hearing in the
4 district of arrest or the district in which the prosecution is
5 pending. Fed. R. Crim. P. 5.1(b). Thus, a defendant may waive his
6 right to a preliminary hearing in the district of arrest and instead
7 choose to hold the hearing upon making his initial appearance in the
8 charging district. Accordingly, preliminary hearing dates are
9 routinely set for defendants making their initial appearance in this
10 district after they have been arrested elsewhere, waived their out-
11 of-district rights in that district, and been ordered transferred to
12 the Central District. This process is exactly what occurred in this
13 case.

14 Defendant nevertheless argues that a Rule 5.1 violation occurred
15 here because "no waiver of prelim was filed in EDCal," suggesting
16 that the Court should infer defendant's assertion of his right from
17 the absence of the form. This argument fails. (Mot. at 4.) As the
18 government's attached declaration makes clear, the practice in the
19 Eastern District is to take a defendant's waiver of his out-of-
20 district rights orally. The recording from defendant's initial
21 appearance in Fresno on June 14, 2017, demonstrates that this is
22 exactly what occurred here. During the initial appearance, Judge
23 Boone instructed defendant of a number of his rights. Defense
24 counsel, AFPD Grantham, then responded by indicating defendant waived
25 the enumerated rights and waived "further advisement of his
26 constitutional or statutory rights." Defendant's statutory rights in
27 this case included whatever rights defendant may have had under Rule
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1 5.1 to have a preliminary hearing held in the Eastern District before
2 his transfer to the Central District.

3 Moreover, there is nothing in the recording, the docket from the
4 Eastern District, or in defendant's brief indicating that AFPD
5 Grantham challenged defendant's transfer to the Central District of
6 California, or further asserted any of defendant's out-of-district
7 rights. Accordingly, defendant effectively waived his right to have
8 a preliminary hearing in the Eastern District. United States v.
9 Amwest Sur. Ins. Co., 54 F.3d 601, 602-03 (9th Cir. 1995) ("An
10 implied waiver of rights will be found where there is 'clear,
11 decisive and unequivocal' conduct which indicates a purpose to waive
12 the legal rights involved.") (quoting Groves v. Prickett, 420 F.2d
13 1119, 1125 (9th Cir. 1970)).

14 Even assuming defendant had addressed and asserted his right to
15 a preliminary hearing during the course of the proceedings in the
16 Eastern District – which he did not – immediate release is not the
17 required remedy. In United States v. Bagios, for instance, defendant
18 was arrested in the Southern District of New York on an out-of-
19 district complaint. No. 11-6030-RSR, 2011 WL 817856 at *1 (S.D. Fla.
20 Mar. 2, 2011). Defendant explicitly stated during his initial
21 appearance that he did not waive his right to a preliminary hearing,
22 but indicated "that he might be willing to continue it." Id. At the
23 subsequent detention hearing, defendant waived a removal hearing and
24 consented to removal to the charging district. Id. Upon arrival in
25 Southern District of Florida some 28 days later, defendant moved for
26 discharge from custody under 18 U.S.C. § 3060(b), arguing release was
27 required where no preliminary hearing had been held within the 14
28 days mandated by § 3060(b)(1). Id. at *2.

1 In considering the motion, the court noted that defendant had
2 waived further proceedings in the district of arrest and found that
3 "a defendant's waiver of further proceedings in an arresting district
4 is not entirely irrelevant to the determination of whether justice
5 requires a delay of the preliminary examination when the delay occurs
6 because a defendant is in transit between districts." Id. at *4.
7 The court further stated that "Rule 5.1 . . . specifically provides a
8 defendant with the option of proceeding with his preliminary hearing
9 in either the arresting district or the charging district." Id.
10 Thus, where a defendant elects to waive further proceedings and
11 instead travel to the charging district for further proceedings,
12 "justice may warrant the delay resulting from the transit period."
13 Id. The court then determined, however, that where the 14-day period
14 had expired during a defendant's transit, the court would require an
15 immediate preliminary examination be offered whether or not the
16 defendant affirmatively requested one. Id. Thus, immediate release
17 is not the appropriate remedy, even assuming defendant had raised the
18 issue of his right to a preliminary hearing during his initial
19 appearance in the Eastern District – which he did not.

20 Accordingly, if the Court concludes that defendant's waiver in
21 the Eastern District was somehow deficient, the government would
22 respectfully request the Court set an immediate preliminary hearing
23 date for July 31, 2017.
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1 **IV. CONCLUSION**

2 For the foregoing reasons, the government respectfully requests
3 that this Court deny defendant's motion as there was no violation of
4 Federal Rule of Criminal Procedure 5.1.¹

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¹ The government anticipates that this motion may be mooted by
the afternoon of July 28, 2017, as the government intends to present
an indictment that morning.